Appendix VII of the Remediation General Permit: Endangered Species & Historic Properties Requirements

I. Endangered Species

A. Background

In order to meet its obligations under the Clean Water Act and the Endangered Species Act (ESA), and to promote the goals of those Acts, the Environmental Protection Agency (EPA) is seeking to ensure the activities regulated by this general permit do not adversely affect endangered and threatened species and critical habitat. All applicants must assess the impacts of their discharges and discharge-related activities on Federally listed endangered and threatened species ("listed species") and designated critical habitat ("critical habitat"), to ensure that those goals are met. Prior to obtaining general permit coverage, applicants must meet the ESA eligibility provisions of this permit. Applicants should follow this guidance at the earliest possible stage to ensure that measures to protect listed species and critical habitat are incorporated early in the development of the Best Management Practices Plan (BMPP).

Applicants also have an independent ESA obligation to ensure that their activities do not result in any prohibited "takes" of listed species¹. Many of the measures required in this general permit and in these instructions to protect species may also assist in ensuring that the applicants activities do not result in a prohibited taking of species in violation of section 9 of the ESA. If the operator has plans or activities in areas where endangered and threatened species are located, they may wish to ensure that they are protected from potential takings liability under ESA section 9 by obtaining an ESA section 10 permit or by requesting formal consultation under ESA section 7. Applicants that are unsure whether to pursue a section 10 permit or a section 7 consultation for takings protection, should confer with the appropriate U.S. Fish and Wildlife Service (FWS)² office or the National Marine Fisheries Service (NMFS).

The FWS and NMFS have identified four species of concern, the **shortnose sturgeon**, the **dwarf wedge mussel**, the **bog turtle**, and the **northern redbelly cooter**. In order to insure protection of these species, applicants must consult with the Service(s) if discharges are proposed in the following locations:

1. areas that may affect the **shortnose sturgeon** (Acipenser brevirostrum), including: a. in the Merrimack River (main stem), from the mouth to Lawrence,

¹ Section 9 of the ESA prohibits any person from "taking" a listed species (e.g., harassing or harming it) unless: (1) the taking is authorized through a "incidental take statement" as part of completion of formal consultation according to ESA section 7; (2) where an incidental take permit is obtained under ESA section 10 (which requires the development of a habitat conservation plan); or (3) where otherwise authorized or exempted under the ESA. This prohibition applies to all entities including private individuals, businesses, and governments.

² Discharges to marine waters may require consultation with the National Marine Fisheries Service instead.

Massachusetts (Essex County) and

b. in the Connecticut River (main stem), from the Massachusetts border with Connecticut to Turners Falls, Massachusetts (Hampshire, Hampden, and Franklin Counties).

- 2. areas that may affect the **dwarf wedge mussel** (Alasmidonta heterodon), including:
 - a. The Connecticut River, from Northumberland, NH, to Dalton, NH (Coos County) and approximately 18 miles south from Lebanon, NH, to North Walpole, NH (Grafton and Sullivan Counties);
 - b. Ashuelot River from below Surry Mountain Flood Control Project, Surry, NH, to West Swanzey, NH (Cheshire County);
 - c. South Branch of Ashuelot River, 0.5 miles in East Swanzey, NH (Cheshire County);
 - d. Mill River; approximately 5 miles in Whatley, MA and Hatfield, MA (Franklin County), as well as 1-2 miles along Mill River Diversion in Northampton, MA; and
 - e. The Fort River, Amherst, MA (Hampshire County).
- 3. areas that may affect the threatened **bog turtle** (Clemmys muhlenbergii), including: bodies of water in the Towns of Egremont and Sheffield (Berkshire County), MA.
- 4. areas that may affect the **northern redbelly cooter** (Pseudemys rubriventris), including: bodies of water occurring within the following boundaries: in the Towns of Plymouth and Carver, (Plymouth County) MA, west of Route 3 and north of Route 25; east of Route 58 and south of Route 44.

EPA may designate the applicants as non-Federal representatives for the general permit for the purpose of carrying out informal consultation with NMFS and FWS. By terms of this permit, EPA has automatically designated applicants as non-Federal representatives for the purpose of conducting informal consultations³. Permit coverage is only available if the applicant contacts the Services to determine that discharges are not likely to adversely affect listed species or critical habitat. Further, informal consultation with the Services must be concluded and result in a written concurrence by the Services that the discharge is not likely to adversely affect an endangered or threatened species.

B. The ESA Eligibility Process

Before submitting a notice of intent (NOI) for coverage by this permit, applicants must determine whether they meet the ESA eligibility criteria by following the steps in Section "D" of this Addendum. Applicants that cannot meet any of the eligibility criteria, must apply for an individual permit.

³ See 50 CFR §402.08 and §402.13 and Part I.B.2.(e).

C. The ESA Eligibility Criteria

The ESA eligibility requirements of this permit, may be satisfied by documenting that one or more of the following criteria has been met. Upon notification, EPA may direct an applicant to pursue eligibility under Criterion B.

- Criterion A: No endangered or threatened species or critical habitat are in proximity to the point where authorized discharges reach the receiving waters.
- Criterion B: In the course of a separate federal action involving the facility/site, formal or informal consultation with the Fish and Wildlife Service and/or the National Marine Fisheries Service under Section 7 of the ESA has been concluded and that consultation:
 - Addressed the effects of the discharges and discharge related activities on listed species and critical habitat; and
 - The consultation resulted in either a no jeopardy opinion or a written concurrence by FWS and/or NMFS on a finding that the discharges and discharge related activities are not likely to adversely affect listed species or critical habitat.
- Criterion C: The activities are authorized under Section 10 of the ESA and that authorization addresses the effects of the discharges and discharge related activities on listed species and critical habitat.

(Eligibility under this criterion is not likely. This criterion involves site activities being authorized through the issuance of a permit under section 10 of the ESA. That authorization addresses the effect of the discharges and related activities on listed species and designated critical habitat. Applicants must follow FWS and/or NMFS procedures when applying for an ESA Section 10 permit (see 50 CFR §17.22(b)(1) for FWS and §222.22 for NMFS). Application instructions for section 10 permits can be obtained by assessing the appropriate websites (www.fws.gov and www.nmfs.noaa.gov) or by contacting the appropriate regional office.)

- Criterion D: Using the best scientific and commercial data available, the effects of the discharges and discharge related activities on listed species and critical habitat have been evaluated. Based on those evaluations, a determination is made by the applicant and affirmed after review by EPA that the discharges and discharge related activity will not affect any federally threatened or endangered species or designated critical habitat.
- Criterion E: The discharges and related activities where already addressed in another operator's certification of eligibility which includes the activities covered

D. The Steps To Determine if the ESA Eligibility Criteria Can Be Met

To determine eligibility, you must assess (or have previously assessed) the potential effects of your known discharge and discharge-related activities on listed species and critical habitat, **PRIOR** to completing and submitting a Notice of Intent (NOI). You must follow the steps outlined below and document the results of your eligibility determination.

Step1. Determine if You Can Meet Eligibility Criterion "A"

Criterion A. You can certify eligibility, according to Criterion A, for coverage by this permit if you can answer "No" to all of the following questions:

- Are there any Endangered Species in your county? Are there any Critical Habitats in your county?
- Are there any Endangered Species or Critical Habitat in proximity to your discharge locations?

Use the guidance below to answer these questions, and to: "Check for Listed Endangered Species in Your County," "Check for Critical Habitat in Your County," and "Check for Proximity to Your Discharge Locations."

If you answered "No" to the questions above, you have met ESA eligibility Criterion A. Skip to Step 4.

If you answered "Yes" to either of the questions above, Go to Step 2.

Check for Listed Endangered Species in Your County.

Look at the latest county species list to see if any listed species are found in your county. If you are located close to the border of a county or your site is located in one county and your discharge points are located in another, you must look under both counties. Since species are listed and de-listed periodically, you will need the most current list at the time you are conducting your endangered species assessment.

Check for Critical Habitat in Your County.

Some (but not all) listed species have designated critical habitat. Exact locations of such habitat is provided in the endangered species regulations at 50 CFR part 17 and part 226. To determine if discharge locations are within designated critical habitat, you should either:

■ Review those regulations (50 CFR Parts 17 and 226) that specify critical

habitat. These regulations can be found in many larger libraries or via the Government Printing Office website, www.access.gpo.gov; or

- Contact the nearest Fish and Wildlife Service (FWS) office. A list of FWS offices for the areas of permit coverage is found in section "F" of this Addendum; or
- Contact the Natural Heritage Program for your state. Heritage programs gather, manage, and distribute detailed information about the biological diversity found within their jurisdictions. They frequently have the most current information on listed species and critical habitat. Contact information for the Heritage program is provided in section "G" of this Addendum.

Check for Proximity to Your Discharge Locations.

You must determine whether listed species or critical habitat are in proximity to your discharges. Listed species and critical habitat are in proximity when they are:

- Located in the path or immediate area through which or over which contaminated water flows from industrial activities to the point of discharge into the receiving water. This may also include areas where discharge water from your site contacts groundwater that has a direct hydrological connection to a receiving water (e.g., groundwater infiltrates at your discharge and re-emerges to enter a surface waterbody within a short period of time.)
- Located in the immediate vicinity of, or nearby, the point of discharge into receiving waters.
- Located in the area where BMPs are planned or are to be constructed.

The area in proximity to be searched/surveyed for listed species will vary with the size of the site, the nature and quantity of the discharges, and the type of receiving waters. You should use the methods which allow you to determine, to the best of your knowledge, whether listed species are in proximity to your particular site. These methods may include:

- Conducting visual inspections. This method may be particularly suitable for sites that are smaller in size or sites located in non-natural settings such as highly urbanized areas where there is little or no natural habitat. For other sites, a visual survey may not be sufficient to determine whether listed species are in proximity.
- Contacting the nearest State Wildlife Agency or U.S. FWS offices. Many endangered and threatened species are found in well-defined areas or habitats. That information is frequently known to state or federal wildlife agencies.

- Contacting local/regional conservation groups such as natural heritage programs (see section G below). These groups inventory species and their locations and maintain lists of sightings and habitats.
- Conducting a formal biological survey. Sites with extensive discharges may choose to conduct biological surveys as the most effective way to assess whether listed species are located in proximity and whether there are likely adverse effects.

Step 2. Determine If You Can Meet Eligibility Criteria "B", "C", or "E"

Criterion B. You can certify eligibility, according to Criteria B, for coverage by this permit if you can answer "Yes" to all of the following questions:

- Has consultation, under ESA Section 7, already been completed for discharges from your site⁴?
- Did the previously completed ESA Section 7 consultation consider all currently listed species and critical habitat and address your discharge and related activities?
- Did the ESA Section 7 consultation result in either a "no jeopardy" opinion by the Service (for formal consultations) or a concurrence by the service that your activities would be "unlikely to adversely affect" listed species or critical habitat?
- Do you agree to implement all measures upon which the consultation was conditioned?

If you answered "Yes" to all four questions above, you have met ESA eligibility Criteria B. Skip to Step 4.

If you answered "No" to any of the four questions above, check to see if you can meet Criteria C or E, or Go to Step 3.

Criterion C. You can certify eligibility, according to Criterion C, for coverage by this permit if you can answer "Yes" to all of the following questions:

■ Has an ESA Section 10 permit already been issued for discharges from your

⁴ A formal or informal ESA Section 7 consultation on this or another federal action (e.g., new source review under NEPA, application for a dredge and fill permit under CWA Sec. 404, application for an individual NPDES permit, etc.) addressed the effects of your site discharges and discharge-related activities on listed species and critical habitat. (See 50 CFR 402.13).

site⁵?

■ Does your ESA Section 10 Permit consider all currently listed species and critical habitat, and address your discharges and related activities at your site?

If you answered "Yes" to the two questions above, you have met ESA eligibility Criteria C. Skip to Step 4.

If you answered "No" to either of the two questions above, check to see if you can meet Criteria E, or Go to Step 3.

Criterion E. You can certify eligibility, according to Criterion E, for coverage by this permit if you can answer "Yes" to all of the following questions:

- Did another site operator previously certify ESA eligibility for your site area⁶?
- Did the other operator's certification of eligibility consider all currently listed species and critical habitat and address your discharge and related activities?
- Do you agree to implement all measures upon which the other operator's certification was based?

Before you rely on another operator's certification, you should carefully review that certification along with any supporting information. You also need to confirm that no additional species have been listed or critical habitat designated in the area of your site since the other operator's endangered species assessment was done. If you do not believe that the other operator's certification provides adequate coverage for your site, you should provide your own independent endangered species assessment and certification.

If you answered "Yes" to all three questions above, you have met ESA eligibility Criteria E. Skip to Step 4.

If you answered "No" to any of the three questions above, Go to Step 3.

Step 3. Determine If You Can Meet Eligibility Criterion "D"

⁵ You have a permit under section 10 of the ESA and that authorization addresses the effects of your discharges and related activities on listed species and critical habitat. You must follow FWS procedures when applying for an ESA section 10 permit (see 50 CFR 17.22(b)(1)).

⁶ In order to meet the permit eligibility requirements by relying on another operator's certification of eligibility, the other operator's certification must apply to the location of your site and must address the effects from your discharges and related activities on listed species and critical habitat.

Criterion D. You can certify eligibility, according to Criterion D, for coverage by this permit if you can answer "Yes" to all of the following questions:

- Have you determined that your site's discharges and related activities are "not likely to adversely affect" listed species or critical habitat, and/or have you reached agreement with the U.S. FWS on measures to avoid, eliminate, or minimize adverse affects?
- Do you agree to implement all measures upon which the determination was conditioned?

Use the guidance below to understand adverse affect determinations, and to answer these questions.

If you answered "Yes" to the both questions above, you have met ESA eligibility Criteria D. Go to Step 4.

If you answered "No" to either of the questions above you are not eligible for coverage by this permit. You must submit an individual application for your discharges to EPA. (See 40 CFR 122.33(b)(2))

If you are unable to certify eligibility under Criterion A, B, C, or E, you must assess whether your discharges and related activities are likely to adversely affect listed species or critical habitat. "Discharge-related activities" include activities which cause, contribute to, or result in, point source discharges. It also includes measures to control discharges, including the siting, construction, operation of water treatment systems and best management practices (BMPs) to control, reduce or prevent water pollution. Please be aware that no protection from incidental takings liability is provided under this criteria.

The scope of effects to consider will vary with each site. If you are having difficulty in determining whether your site is likely to cause adverse effects to a listed species or critical habitat, you should contact the appropriate office of the FWS, or Natural Heritage Program for assistance. In order to complete the determination of effects it may be necessary to follow the consultation procedures in section 7 of the ESA. (See Criteria B information above, and section 7 consultation web link in section F below).

Upon completion of your assessment, document the results of your effects determination. If adverse effects are not likely, you are eligible under criterion "D" - proceed to Step 4 of this Addendum. Your determination may be based on measures that you implement to avoid, eliminate, or minimize adverse affects.

If the determination is "May Adversely Affect." You must contact the FWS to discuss your findings and measures you could implement to avoid, eliminate, or

minimize adverse affects. If you and the service(s) reach agreement on measures to avoid adverse effects, you are eligible under criteria "D". Any terms and/or conditions to protect listed species and critical habitat that you relied on in order to complete an adverse effects determination, must be incorporated into your BMPP (required by the permit) and implemented in order to maintain permit eligibility.

If endangered species issues cannot be resolved. If you cannot reach agreement with the FWS on measures to avoid, eliminate, or reduce adverse effects, and the likely adverse effects cannot be otherwise addressed through meeting the other criteria, then you are not eligible for coverage under this general permit. You must seek coverage under an individual permit.

Effects from discharges and discharge-related activities which could pose an adverse effect include:

- Hydrological. Discharges may cause siltation, sedimentation or induce other changes in receiving waters such as temperature, salinity or pH. These effects will vary with the amount discharged and the volume and condition of the receiving water. Where a discharge constitutes a minute portion of the total volume of the receiving water, adverse hydrological effects are less likely.
- **Habitat.** Excavation, site development, grading, and other surface disturbance activities, including the installation or placement of water treatment systems or BMPs, may adversely affect listed species or their habitat. Discharges associated with site operation may drain or inundate listed species habitat.
- *Toxicity*. In some cases, pollutants in discharges may have toxic effects on listed species.

Step 4. Submit Notice of Intent and Document Results of the Eligibility Determination.

Once the ESA eligibility requirements have been met, and you have determined NHPA eligibility (see Section II of this Appendix, you may submit the Notice of Intent (NOI). Signature and submittal of the NOI constitutes your certification, under penalty of law, of your eligibility for permit coverage.

You must include documentation of ESA eligibility in the NOI. Documentation required for the various ESA eligibility criteria are as follows:

Criterion A: A copy of the most current county species list pages for the county(ies) where your site and discharges are located. You must also include a statement on how you determined that no listed species or critical habitat are in proximity to your site or site discharge locations.

Criterion B: A copy of the FWS's biological opinion or concurrence on a finding of "unlikely to adversely effect" regarding the ESA Section 7 consultation.

Criterion C: A copy of the FWS's letter transmitting the ESA Section 10 authorization.

Criterion D: Documentation on how you determined adverse effects on listed species and critical habitat were unlikely.

Criterion E: A copy of the documents originally used by the other operator of your site (or area including your site) to satisfy the documentation requirement of Criteria A, B, C or D.

E. Duty To Implement Terms and Conditions Upon Which Eligibility Was Determined

You must comply with any terms and conditions imposed under the ESA eligibility requirements to ensure that your discharges and discharge-related activities do not pose adverse effects or jeopardy to listed species and/or critical habitat. You must incorporate such terms and conditions into your BMPP as required by the permit. If the ESA eligibility requirements of Part I.B.4. & 5. cannot be met, then you may not be covered under this permit, and must apply for an individual permit.

F. U.S. Fish and Wildlife Service Offices

National Websites For Endangered Species Information:
Endangered Species Home Page: http://endangered.fws.gov/
ESA Section 7 Consultations: http://endangered.fws.gov/consultations/index.html

U.S. FWS Region 5
Division Chief, Endangered Species
U.S. Fish and Wildlife Service
ARD Ecological Services
300 Westgate Center Drive
Hadley, MA 01035-9589

Project Leader, USFWS New England Field Office 22 Bridge Street, Unit #1 Concord, NH 03301-4986

G. National Marine Fisheries Services

Website: http://www.nmfs.gov

Regional Office

Protected Resource Program
National Marine Fisheries Service
Northeast Region
One Blackburn Drive
Gloucester, MA 01930

Protected Species Branch NMFS Northeast Fisheries Science Center 166 Water Street Woods Hole, MA 02543

H. Natural Heritage Network

The Natural Heritage Network comprises 75 independent heritage program organizations located in all 50 states, 10 Canadian provinces, and 12 countries and territories located throughout Latin America and the Caribbean. These programs gather, manage, and distribute detailed information about the biological diversity found within their jurisdictions. Developers, businesses, and public agencies use natural heritage information to comply with environmental laws and to improve the environmental sensitivity of economic development projects. Local governments use the information to aid in land use planning.

The Natural Heritage Network is overseen by NatureServe, the Network's parent organization, and is accessable on-line at: http://www.natureserve.org/nhp/us_programs.htm, which provides website and other access to a large number of specific biodiversity centers.

Massachusetts Natural Heritage & Endangered Species Program Division of Fisheries and Wildlife Route 135 Westborough, MA 01581 508/792-7270

New Hampshire Natural Heritage Inventory Department of Resources & Economic Development 172 Pembroke Street, P.O. Box 30370 Concord, NH 03302 603/271-3623

II. Historic Properties Guidance

A. Background

Applicants must comply with applicable State, Tribal and local laws concerning the protection of historic properties and places and applicants are required to coordinate with the

State Historic Preservation Officer and/or Tribal Historic Preservation Officer and others regarding effects of their construction dewatering discharges on historic properties. Facilities which adversely affect properties listed or eligible for listing in the National Registry of Historic Places under the National Historic Preservation Act of 1966, 16 USC Sections 470 et seq. are **not** authorized to discharge under this permit.

B. Determination of Potential Impact

Applicants must determine whether their site's discharges or implementation of best management practices (BMPs) to control such discharges, has potential to affect a property that is either listed or eligible for listing on the National Register of Historic Places.

For existing dischargers whose water treatment systems and BMPs do not require construction activities (e.g., the treatment system is contained in a trailer), a simple visual inspection may be sufficient to determine whether historic properties are affected. However, for sites which are new dischargers and for existing sites which are planning construction activities related to treatment systems or BMPs, applicants should conduct further inquiry to determine whether historic properties may be affected by the discharge or BMPs to control the discharge. In such instances, applicants should first determine whether there are any historic properties or places listed on the National Register or if any are eligible for listing on the register (e.g., they are "eligible for listing").

EPA suggests that applicants first access the "National Register of Historic Places" information listed on the National Park Service's web page: http://www.cr.nps.gov/nr. The addresses for State Historic Preservation Officers are listed in Section II of this appendix. Applicants may also contact city, county or other local historical societies for assistance, especially when determining if a place or property is eligible for listing on the register.

C. Permit Eligibility Criteria

The following three scenarios describe how applicants can meet the permit eligibility criteria for protection of historic properties under this permit:

- (1) If historic properties are not identified in the path of a site's discharges or where construction activities are planned to implement BMPs to control such discharges (e.g., diversion channels or retention ponds), then the applicant is eligible for coverage under this permit.
- (2) If historic properties are identified but it is determined that they will not be affected by the discharges or construction of BMPs to control the discharge, the applicant has met the NHPA eligibility criteria for coverage under this permit.
- (3) If historic properties are identified in the path of discharges or where construction activities are planned to implement BMPs to control such discharges, and it is determined

that there is the potential to adversely affect the property, the applicant can still meet the NHPA eligibility criteria under of this permit, if he/she obtains and complies with a written agreement with the appropriate State or Tribal Historic Preservation Officer which outlines measures the applicant will follow to mitigate or prevent those adverse effects. The contents of such a written agreement must be included in the BMPP.

In situations where an agreement cannot be reached between an applicant and the State Historic Preservation Officer, applicants should contact the Advisory Council on Historic Preservation listed in Section II.E. below for assistance.

The term "adverse effects" includes but is not limited to damage, deterioration, alteration or destruction of the historic property or place. EPA encourages applicants to contact the appropriate State or Tribal Historic Preservation Officer as soon as possible in the event of a potential adverse effect to a historic property.

Applicants are reminded that they must comply with applicable State, Tribal and local laws concerning the protection of historic properties and places.

D. Internet Information on the National Register of Historic Places

The National Register of Historic Places is the Nation's official list of cultural resources worthy of preservation. Authorized under the National Historic Preservation Act of 1966, the National Register is part of a national program to coordinate and support public and private efforts to identify, evaluate, and protect our historic and archeological resources. Properties listed in the Register include districts, sites, buildings, structures, and objects that are significant in American history, architecture, archeology, engineering, and culture. The National Register is administered by the National Park Service, which is part of the U.S. Department of the Interior.

An electronic listing of the ``National Register of Historic Places," as maintained by the National Park Service, can be accessed on the Internet at: http://www.cr.nps.gov/nr

E. State Historic Preservation Officers (SHPO)

Massachusetts Historical Commission 220 Morrissey Boulevard Boston, MA 02125 617/727-8470

TTD: 1-800-392-6090

New Hampshire Division of Historic Resources P.O. Box 2043 Concord, NH 03302-2043 603/271-6435

TDD: 1-800-735-2964

III. Advisory Council on Historic Preservation

The Advisory Council on Historic Preservation (ACHP) is an independent Federal agency that promotes the preservation, enhancement, and productive use of our Nation's historic resources, and advises the President and Congress on national historic preservation policy.

The goal of the National Historic Preservation Act (NHPA), which established ACHP in 1966, is to have Federal agencies act as responsible stewards of our Nation's resources when their actions affect historic properties. ACHP is the only entity with the legal responsibility to encourage Federal agencies to factor historic preservation into Federal project requirements.

As directed by NHPA, ACHP serves as the primary Federal policy advisor to the President and Congress; recommends administrative and legislative improvements for protecting our Nation's heritage; advocates full consideration of historic values in Federal decision making; and reviews Federal programs and policies to promote effectiveness, coordination, and consistency with national preservation policies.

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